(3)

No. 92-905

Supreme
DEC 28 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court Of The State of Hawaii

BRIEF OF THE STATE OF HAWAII AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
*Attorneys for the
State of Hawaii*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

No. 92-905

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court Of The State of Hawaii

BRIEF OF THE STATE OF HAWAII AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

Section 666-21 of the Hawaii Revised Statutes, known as the Hawaii Rent Trust Fund Statute, affects the public interest in low-cost rental property, by providing, on notice and opportunity to be heard, the establishment of secured funds in the state District Court, out of which disputed rental amounts may be paid at the conclusion of Hawaii's "summary possession" proceeding. Although the failure to comply with an order directing the payment of trust amounts constitutes, in effect, a default under the

summary possession statute, tenant litigants do have, prior to the issuance of an order directing payment of trust fund amounts, the full opportunity to contest before the state District Court both the amounts genuinely in dispute under the lease and whether the lease allows rent to be withheld while the tenant remains in possession. Because the Trust Fund law is an essential part of Hawaii's definition of the landlord's interest in its fee, and provides, in narrowly drawn fashion, a critical benefit to Hawaii tenants who *do* pay their rent on time – namely a rental market which is not inflated by costs of more expensive eviction procedures – the State of Hawaii has an important interest in this case. Indeed, under 28 U.S.C. § 2403(b), Hawaii would be entitled to intervene in this case, now that it is in a court of the United States. In the interest of expediting consideration of this Petition, however, Hawaii files this amicus curiae brief in support of Respondent, and requests that, if certiorari is granted, the Court issue an order pursuant to 28 U.S.C. § 2403(b) allowing the State of Hawaii to file a brief as a respondent and to participate in argument.

REASONS FOR DENYING THE WRIT

1. Petitioners have fundamentally misconstrued the nature of remedies afforded by Haw. Rev. Stat. § 666-21, in seeking to manufacture a substantial federal question where none exists. Section 666-21, prior to effecting any "deprivation" against a tenant, permits a full blown adversary and evidentiary hearing on the amounts of "any disputed rent," as well as the defenses of payment and the existence of "a written instrument agreeing that

the rent could be withheld or deducted" without yielding up possession. Under Hawaii law, moreover, implied terms, such as the warranty of habitability, are deemed part of the "written instrument," and therefore all bases for withholding rent and remaining in possession are sufficiently at issue – if pressed – at the stage where the trust fund is established. *See Quedding v. Arisumi Brothers, Inc.*, 66 Haw. 335, 338, 661 P.2d 706, 709 (1983) (per curiam) (quoting *City and County v. Kam*, 48 Haw. 349, 355, 401 P.2d 683, 687 (1965)). Moreover, to the extent Petitioners are raising a facial challenge, they are bound to demonstrate "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This Petitioners do not even try to do.

2. As applied to this case, the Rent Trust Fund Statute operates similarly to the preliminary possession procedure at issue in *Lindsey v. Normet*, 405 U.S. 56 (1972). The justification for that procedure – the abolition of the common law right to resort to self-help to evict a non-paying tenant – is equally applicable in Hawaii, which has adopted "[t]he common law of England," except as provided otherwise by the laws of the United States, the constitution and statutes, or precedents, custom, or usage antedating the annexation of Hawaii by the United States. Haw. Rev. Stat. § 1-1. Petitioners, it should be stressed, could have avoided all resort to summary possession by providing, explicitly, in the lease at issue for the right to withhold payments for the reasons Petitioners asserted below (but do not identify at this stage). This they did not do either.

3. The issue of whether the agreement permitted the tenants to remain in possession was adequately litigated below, and there is no basis in federal law for review of the findings adverse to Petitioners here. Accordingly, there is no basis for review of any question whether adequate "process" was given. As in *Lindsey*, Hawaii provides pre-deprivation process on what are in effect the issues of possession, *see* 405 U.S. at 72, and this Court should not grant review to determine the subsidiary issues of state law here, namely, what does and does not constitute an implied justification for withholding rent while remaining in possession. *See Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2901 (1992) ("background principles" of state law not appropriate for review in the federal courts).

4. Petitioners' equal protection challenges are of no greater moment, for this Court has already determined that it is permissible to treat landlord-tenant matters differently from other sorts of litigation. *See Lindsey*, 405 U.S. at 74-79.

CONCLUSION

For the foregoing reasons and those stated by Respondent, the writ should be denied. Should the Court grant the writ, it should treat this Brief as a motion for leave to intervene under 28 U.S.C § 2403(b), permit the State of Hawaii to file a brief as respondent, and allow the State of Hawaii to provide argument on the federal issues here.

Dated: Honolulu, Hawaii, December 24, 1992.

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

Department of the
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365
Attorneys for the
State of Hawaii